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CONTRACTS

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Contracts

1.0 Purpose

The purpose of this policy is to establish uniform guidelines for the trial court to follow in preparing, reviewing, negotiating, and entering into contractual agreements with qualified vendors.

2.0 Policy Statement

The trial court shall issue a contract when entering into agreements for services or complex procurements of goods. It is the responsibility of every court employee authorized to commit trial court resources to apply contract principles and procedures that protect the interests of the court.

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4.0 Application

This policy applies to all trial court officials and employees.

5.0 Definitions

1. **Certificate of Insurance.** A document that provides evidence that an insurance policy has been written and that includes a statement of the policy coverage in general terms.
2. **Change Order.** Documentation of informal and/or immaterial changes to a contract, usually signed by the project managers of each party. A change order may lead to a contract amendment.
3. **Consideration.** The price, payment, or other compensation made in return for performance of an action under a contract.
4. **Contract.** An agreement between two parties to perform an action in return for some consideration (compensation). The contract defines the scope, schedule, consideration, and terms and conditions which the parties agree to abide by under the agreement.
5. **Contract Amendment.** A formal contract modification authorized and signed by the contracting parties that describes a material change to the contractor's originally contracted work, price, time for performance, or other contract terms and conditions, and specifies cost and time impacts regardless of whether they are increases, decreases, or zero.
6. **Contract Dispute.** A difference of opinion between contracting parties regarding the meaning and interpretation of the contract language, specifications, schedule, price, or other related issues that generally impact performance, completion, payment, amendments, claims, or other contractual rights.
7. **Contract Modification.** Any written alteration in an existing contract's specifications, delivery point, rate of delivery, contract period, price, quantity, or other provision. Modifications can be either bilateral or unilateral and include actions such as change orders or contract amendments.

8. **Contractor.** A person or business that enters into an agreement (a contract) to provide goods or services to another party in return for legal consideration.
9. **Contract Suspension.** A temporary delay of contract performance initiated by a written notice from the trial court to the contractor.
10. **Indemnification.** In a contract, a clause that requires a contractor to compensate, reimburse or hold the trial court harmless from loss, damage, or liability that may arise out of the contractor's performance of the contract.
11. **Liquidated Damages.** An amount fixed in a contract that is assessed against a contractor when it breaches the delivery provision of a contract (e.g., it fails to complete delivery, installation, services, or the work specified in a contract within a defined period of performance or schedule).
12. **Negotiate.** To communicate with another party to arrive at an agreement.
13. **Purchase Order (P.O.).** A form of contract used to document a purchase transaction (usually for goods). Purchase orders are sequentially numbered for control purposes, with fields that identify the quantity, price, and description of goods ordered, payment terms, discount factors, and date of delivery or performance.
14. **Retention.** An amount that is withheld from contractor payments until final and satisfactory project completion.
15. **Termination.** An action by the trial court or contractor to unilaterally end all or part of the work under a contract.

16. **Warranty.** A contractor's, vendor's, or supplier's promise or guarantee regarding the nature, usefulness, service life, or conditions of the goods or services provided.

6.0 Text

1. This section addresses basic contract principles and policies that must be applied to agreements for services and complex procurements of goods. Complex procurements are those buying activities that require considerable and detailed explanation of the requirements and obligations of the buyer and seller. Complex procurements also require special contract clauses that are not typically covered by the standard terms and conditions of a purchase order. Purchase order terms and conditions are usually sufficient when goods are purchased, but rarely apply to contracts for services.
2. It is the responsibility of every person authorized to commit the trial court's resources to review, negotiate, award, and manage contracts that protect the interests of the court. The contractual obligations and liabilities assumed by the court should be reasonably proportionate to the kinds of goods and services it receives from its contractors.

6.1 Contract Elements

1. Every contract must identify the contracting parties and consists of four major elements: **cost, schedule, scope of work, and terms and conditions**. Each major element must be clearly defined in every contract so that: 1) the court's needs are met, and 2) the contractor and the trial court understand their performance obligations.
2. **Cost.** The cost to the trial court (or the price it will pay the contractor) for goods and services under a contract must be clearly stated:
 - a. The cost may be expressed as a lump sum (one-time payment),

- firm fixed price, unit price, labor rate, or other specific cost basis.
- b. If the court is contracting for labor, a schedule listing the hourly, daily, weekly, or monthly cost for each person or job classification must be incorporated into the contract. This includes firm fixed price or lump sum contracts, where the schedule may be used as the basis for establishing the cost of additional work authorized under the contract.
 - c. Each party's responsibility for costs that may apply such as shipping, sales tax, permits, licenses, installation, bonds, etc., should be defined.
 - d. The duration of some contracts may be longer than one year. For these multi-year contracts, the contractor may want to build in automatic price increases at certain intervals. The contract should include the price or rates for the additional years. The court should determine whether any such increases are acceptable.
 - e. The court may be restricted by statute or policy regarding the allowability of certain costs. The contract should address this issue, if it exists.
 - f. With regard to payment, the contract should define how frequently the contractor may submit invoices (typically monthly) and what the terms of payment will be.
 - g. If the court requires contractors to use special forms or formats in submitting invoices, those conditions should be stated in the contract.
 - h. The contract should define the conditions under which the court may withhold payment, either as a retention or in the event of a dispute with the contractor.
 - i. The contract should clearly state when payment or partial payment is due and whether or not payment is tied to completion or acceptance of tasks or deliverables.

3. **Schedule.** Time is usually a critical element in every contract. The schedule of when work shall be started and completed must be included in the contract. If applicable, interim dates for the completion of specific portions of the contract should also be stated.
4. **Scope of Work.** The contract must:
- a. Clearly define the services to be performed or the goods to be provided so that the parties agree upon the contract's scope and a determination can be made as to when consideration is due to the contractor.
 - b. Be appropriate to the type of agreement. The trial court's standard purchase order may be sufficient for a simple purchase of goods, but in many cases purchase order terms are not applicable or are insufficient when the court is contracting for services.
 - c. List any inclusions or exclusions.
 - d. Specify details such as supervision, labor, equipment or materials that are to be supplied by either the court or the contractor should also be specified.
 - e. Identify project milestones as well as any service, product deliverables, or tasks for which the contractor is responsible.
 - f. Address the possible conditions that may arise during performance of the contract that would trigger additions or deletions to the scope of work, schedule or consideration.

Additional descriptive information may be attached to the contract as an exhibit to help define the scope of work.

5. **Terms and Conditions.** Contract terms and conditions can be somewhat flexible to suit the needs of the court and the specific contract circumstances. It is the responsibility of authorized trial court employees to assure that contract terms and conditions are appropriate to the type of contract that is being awarded. Additional

language may be necessary to incorporate “special” conditions and protect the court’s interests. Examples of contract terms and conditions that may be negotiable include, but are not limited to:

- a. Contract schedule, specifications, and quantities. Portions of a contract that define the time for performance of the scope of work and any intermediate milestones; provide a detailed statement of particulars, especially statements prescribing materials, methods, and quality of work; and the number, amount, or quantity of specific items that are to be provided by the contractor for a specific project.
- b. Delivery or completion dates. Refers to specific times during contract performance by which particular goods or services must be delivered or completed.
- c. Contract type. Refers to the method by which a contractor is reimbursed for goods provided or services rendered. Selection of the appropriate contract type is based upon the contractual obligations of the parties and the timing of payments. Examples of contract types include firm fixed price, unit price, time and materials, cost reimbursable, etc.
- d. Independent contractor. Establishes that the contractor is not an employee or agent of the trial court, but is a distinct entity in the business of providing certain types of goods or services.
- e. Payment terms and frequency. Refers to the requirements and proper format for contractors to submit invoices for services that have been completed or goods that have been delivered. Establishes the time in which the trial court must pay undisputed portions of contractor invoices after they have been received.
- f. Withholding of payments (retention). The part of a contract that establishes an amount, if any, to be withheld from progress billings until final and satisfactory project completion.
- g. Availability of Funds (for multi-year contracts, contracts that cross fiscal years, and mid-year funding cuts). Establishes that funds

- that are expected to be available for payment for goods or services provided by a contractor may be withdrawn, reduced, or limited prior to the expiration of the contract. In such a case, the court may terminate the contract and the contractor is paid for goods delivered or work performed up to the date of termination.
- h. **Warranty.** The part of a contract that establishes any promise or guarantee on the part of the contractor regarding the nature, usefulness, service life, or conditions of the goods or services provided under the contract.
 - i. **Allowable vs. unallowable costs (profit or markups on materials and subcontracts).** Certain cost reimbursable contracts may contain a schedule of the types of costs for which the contractor is specifically entitled to reimbursement and those costs that are not eligible for reimbursement.
 - j. **Requirements for bonds or letters of credit.** Refers to written instruments executed by the contractor and its surety to protect or reimburse the trial court should the contractor fail to perform some obligation. If the contractor's obligations are not met, the bond or letter of credit insures payment to the extent specified in the contract documents. Common types of bonds include bid, payment, and performance bonds. Since the costs of the bonds or letters of credit are usually passed on to the trial court as part of the contractor's costs, the requirement for bonds or letters of credit should therefore be scrutinized by the court.
 - k. **Inspection, testing and acceptance requirements.** Part of a contract that establishes any required examination or testing of procured items or services to determine whether they have been received in the proper quantity and condition and conform to applicable specifications. Acceptance for services should be written and issued to the contractor to indicate acceptance of a deliverable or submittal to be in compliance with the contract's requirements. A contractor is typically not paid for a deliverable or submittal until it has been accepted.

- l. Labor documentation (contractor timesheets). A contract may require that the contractor's invoices be accompanied by documentation such as workers' signed and approved timesheets to substantiate the work for which the invoice has been submitted.
- m. Financial requirements. For large or long-term contracts that require significant contractor investments of time, labor and capital, the trial court may require that the contractor's organization meet certain financial requirements that indicate financial stability.
- n. Insurance requirements. A listing of the minimum insurance coverage that must be maintained by the contractor during the course of the work as well as the requirements for submitting evidence of such coverage.
- o. Indemnification. The part of a contract that establishes the extent to which the contractor is required to compensate, reimburse or hold the trial court harmless from loss, damage, or liability that may arise out of the contractor's performance of the contract.
- p. Liquidated damages. The part of a contract that establishes a fixed amount that will be assessed against the contractor if it breaches specified delivery provisions of a contract (e.g., it fails to complete delivery, installation, services, or the work specified in a contract within a defined period of performance or schedule). A liquidated damage is a sole remedy for damages resulting from a breach of schedule; therefore, legal counsel should be obtained prior to its inclusion in a contract.
- q. Termination clauses. The portion of a contract that gives the trial court the right to terminate the contract unilaterally, either for cause, convenience, or unavailability of funds.
- r. Contract changes clause. The part of a contract that defines the conditions under which the contractor may request a material or immaterial change to the contract and the responsibility of the trial court to consider the contractor's request.

- s. **Audit rights.** The part of a contract that establishes the right of the trial court to conduct an audit of the contractor's financial records and records that specifically relate to the work performed by the contractor for the trial court.
- t. **Disputes/Dispute Resolution.** Defines the process to be followed and the rights of each party in the event of a disagreement between the trial court and the contractor.
- u. **Contract Suspension.** Defines the conditions under which the trial court may unilaterally order the contractor to stop work and the conditions that apply for resumption of work or eventual termination of the contract.
- v. **Remedies (regarding correction of issues discovered during audits, poor contractor performance, etc.).** The part of a contract that establishes the trial court's rights and the process to be followed in the event of a contractor's failure to perform as required by the contract terms and conditions.
- w. **Confidentiality.** The performance of certain contracts may require a contractor to generate or be furnished data by the trial court that is about individuals, organizations, or government programs. In these instances, the contract should contain a clause that addresses the kinds of data to be generated by the contractor and/or data to be furnished by the trial court that are considered confidential and how it should be treated. Examples of situations where the clause may be appropriate include:
 - i. Studies that generate information or involve trial court-furnished information that is personally identifiable, such as medical records, vital statistics, surveys, and questionnaires.
 - ii. Contracts that involve the use of salary structures, wage schedules, proprietary plans or processes, or confidential financial information of organizations other than the contractor's.

- iii. Any work that requires the contractor to access the trial court's proprietary systems or software.
- x. Ownership of deliverables. The part of a contract that establishes the rights of each party regarding the use and ownership of items that are delivered to the trial court under the contract and for which the contractor is compensated. The trial court typically owns the deliverables produced by the contractor.
- y. Notice (to whom legal notices should be sent). A statement in a contract regarding to whom specific types of written notices or communications are to be sent.

Refer to Procedure No. FIN 7.03, Contract Administration, for more information on a number of these subjects.

6.1.1 Requirements for Contracts with Credit Card Issuers

1. GC 6159 (c) establishes the minimum requirements that must be met when the trial court enters into contracts with credit card issuers so that the court may accept various types of payments by credit card. These contracts must define:
 - a. The respective rights and duties of the trial court and credit card issuer regarding the presentation, acceptability, and payment of credit card drafts.
 - b. A reasonable method to facilitate payment settlements.
 - c. A reasonable fee or discount to be paid to the credit card issuer.
 - d. Other matters that may be agreed upon by the parties.
2. Additional information regarding credit card payments is provided in Procedure Nos. FIN 10.01, Revenue Collection and Distribution, and FIN 10.02, Cash Handling.

6.2 Contractor Insurance

1. Contractors providing services to the trial court shall maintain and show proof of adequate insurance coverage before beginning work on any contract with the court.
2. Contractor insurance policies must be endorsed to include the trial court as an additional insured. Certificates of insurance must be received from the contractor or be verified as current and on file with the court prior to the beginning of any work.
3. Trial court contractors shall maintain insurance coverage that is appropriate to their business operations and the nature of the work, goods or services provided to the court. Examples of the types of insurance coverage generally maintained by reputable contractors include, but are not limited to:
 - a. Workers Compensation and Employer's Liability.
 - b. Commercial General Liability including property damage and bodily injury.
 - c. Automobile Liability – Owned, non-owned, and hired vehicles, including bodily injury and property damage.
 - d. Professional Liability (errors and omissions) – Required if contractor provides professional/design services (attorneys, consultants, architects, engineers, etc.).

6.3 Contract Negotiation

1. Contract negotiations shall only be conducted on contracts for which negotiations have been authorized. Not all contracts are negotiated.
2. Contract negotiations shall only be conducted by court employees who are authorized to commit the court with respect to the subject matter and dollar value of the prospective contract.

3. Prior to beginning negotiations, the trial court shall develop a negotiation strategy that addresses the critical points of the contract.
4. Legal counsel should be sought when negotiating indemnification, liquidated damages, limitation of liability, and other such provisions.
5. At the conclusion of negotiations it is recommended that a memorandum be prepared summarizing the results of the negotiations and the final agreements on contract cost, scope of work, schedule, and terms and conditions. The memorandum serves as the record of negotiations for the contract file, documenting the specific points of agreement between the court and the contractor prior to execution of the contract. The memorandum is not a part of the contract but can be a useful communication device for the court internally as well as with the contractor, and can be used to settle any misunderstandings, confusion or challenges that may arise later.

6.4 Risk Evaluation

1. The trial court shall conduct its business in a way that minimizes financial risk and avoids unnecessary liability.
2. The trial court shall only enter into contracts with individuals, businesses and other legal entities that are financially and operationally sound. They must demonstrate an ability to meet the requirements of the contract scope of work. They must also meet the applicable insurance and bonding requirements of the court.
3. All of a contract's terms and conditions are important, but there are key clauses that must be carefully reviewed with respect to the degree of risk the court is willing to assume including:
 - a. Indemnification – This provision of a contract can limit the parties' responsibility to reimburse each other in the case of an accident, injury, or property damage.

- b. Warranty – The contractor should provide a warranty that protects the court against the failure of goods provided or services performed for a reasonable period of time given the nature of the scope of work.
 - c. Insurance – The types and amounts of insurance carried by a contractor may limit the compensation the court can recover in case of an accident, injury or property damage caused by the contractor.
 - d. Liquidated damages – The purpose of this section of the contract is to establish and agree to a monetary damage if specified schedule conditions are not met.
 - e. Dispute resolution – The contract should contain a description of how the parties will seek to resolve any dispute that arises during the performance of the contract.
4. There may be instances when prospective contractors insist on contract terms, payment schedules, work schedules, restrictive scopes of work or other conditions that are unacceptable to the court. Other times, prospective contractors may not maintain acceptable levels of insurance or be able to meet special bonding requirements. The trial court should avoid circumstances that would force or coerce the trial court to enter into a contract in which risks or liabilities outweigh the benefits. After examination of all the issues, the trial court may elect to contract with another party whose terms are more beneficial to the court.
5. Prior to execution, contract documents shall be reviewed by an authorized and knowledgeable employee for conformance with the court's requirements and any negotiations that have occurred. The scope, schedule, cost, terms and conditions, and items such as the court's liability exposure, insurance and bonding requirements must be reviewed and approved before the contract is transmitted to the

contractor for execution. The contract review checklist at the end of this section may be used as an aid in contract review.

6.5 Contract Execution

1. Trial court contractual agreements shall only be executed by authorized court employees acting within the scope and authorization level (dollar amount) of their official duties.
2. The trial court should not allow any contractor to begin work without a fully executed (signed by both parties) contract. In addition, the contractor should provide all applicable insurance and bonding documentation to the court prior to beginning work.
3. The trial court's files shall contain an **original, fully executed copy of every contract** it enters into.
4. Contract files shall be retained according to the requirements established in Procedure 12.01, Record Retention.

7.0 Associated Documents

Contract Review Checklist

The checklist is presented as a minimal listing of requirements only. Each court may expand the listing as a job aid to their staff.

Scope of Work	Yes	No
<ol style="list-style-type: none"> 1. Are the trial court's standard contract terms and conditions applicable to the scope of work? 2. Is the scope of work clearly defined for the price and performance? 3. Are the criteria for the contractor's completion of work or the trial court's acceptance of work clearly defined? 4. Is the contract type (lump sum, time and materials, fixed price, unit price, etc.) appropriate to the scope of work? 5. Are each party's responsibilities clearly defined? 6. Are the contract's expected results (i.e., deliverables) defined? 7. Is the changes clause reasonable and appropriate? <p>Required action:</p>		
Pricing		
<ol style="list-style-type: none"> 1. Check documentation that contractor's pricing is reasonable and appropriate. 2. Have applicable taxes been identified and included in the price? 3. On multi-year contracts, has the contractor built in any price escalation? If so, is this acceptable? 4. Does the contractor's price include any items that may not be allowable by the court? 5. If payment is tied to a deliverable or completion of a task, is the deliverable/task clearly stated? <p>Required action:</p>		

The checklist is presented as a minimal listing of requirements only. Each court may expand the listing as a job aid to their staff.

Payment	Yes	No
<ol style="list-style-type: none"> 1. Is the contractor's invoicing schedule acceptable? 2. Is the contractor's invoice format acceptable? 3. Does the contract require the contractor to comply with any special court invoicing or invoice documentation requirements? 4. May the court withhold payment of any disputed portions of invoiced amounts? 5. Are the terms of payment acceptable to the court? 6. Is there a retainage on progress payments? If so, what is the retainage percentage? What are the criteria for releasing a retention? <p>Required action:</p>		
Risk Evaluation		
<ol style="list-style-type: none"> 1. Is indemnification language acceptable to the court? 2. Is the contractor's warranty appropriate to the scope of work? 3. Does the contractor maintain the insurance levels of required by the contract? 4. Is the contractor able to meet any special bonding requirements? 5. Does the contract include a provision for liquidated damages? Are the damages appropriate to the scope of work? Has legal counsel been sought? 		

The checklist is presented as a minimal listing of requirements only. Each court may expand the listing as a job aid to their staff.

Risk Evaluation (continued)		
<p>6. Are limitations of liability included? If so, are they acceptable given what conduct they address, what remedies/damage they impact, and what the “caps” are?</p> <p>Required action:</p>		
Miscellaneous		
<p>1. Does the contract define the procedure for terminating the contract for cause, convenience, or lack of appropriation of funds?</p> <p>2. Are any small or disabled veteran business goals defined?</p> <p>Required action:</p>		